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No. 09-1079

In the Supreme Court of the United States

MAYRA RIVAS-RODRIGUEZ, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner had failed to demonstrate that she faces a well-founded fear of persecution for which "one central reason" is her membership in a particular social group, as required to establish her eligibility for asylum under 8 U.S.C. 1158(b)(1)(B)(i).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter* but is reprinted in 355 Fed. Appx. 740. The decisions of the Board of Immigration Appeals (Pet. App. 6a-8a) and the immigration judge (Pet. App. 9a-24a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2009. The petition for a writ of certiorari was filed on March 10, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General and the Secretary of Homeland Security may grant asylum

to an alien who is a "refugee," 8 U.S.C. 1158(b)(1)(A), defined as a person "who is unable or unwilling to return to [his or her] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. 1101(a)(42)(A). In 2005, Congress modified the requirements for establishing eligibility for asylum. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(a)(3), 119 Stat. 303.[1] The applicant bears the burden of establishing that he or she is a refugee, as defined above. 8 U.S.C. 1158(b)(1)(B)(i). To come within that definition, the applicant must establish that "race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting" him or her. *Ibid.*

2. a. Petitioner, a native and citizen of El Salvador, entered the United States on April 2, 2005. Pet. App. 2a, 10a. On April 4, 2005, the Department of Homeland Security served petitioner with a Notice to Appear, alleging that she was removable pursuant to 8 U.S.C. 1182(a)(6)(A)(i) as an alien present in the United States without having been admitted or paroled. Pet. App. 10a; see *id.* at 6a. Petitioner conceded that she was removable as charged, but (after the effective date of the REAL ID Act) sought various forms of relief, including asylum. *Id.* at 2a, 10a; see Gov't C.A. Br. 4, 19 n.3. Petitioner based her application for asylum on, *inter alia*, her claimed fear of future persecution in El Salvador by gang members on account of her membership in a particular social group. Pet. App. 11a. Petitioner described

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[1] The amendment applies to applications for asylum filed after May 11, 2005. 8 U.S.C. 1158 note.

her claimed social group as "young females who regularly receive money from a parent working in the United States, and who lack[] protection from those in a society who traditionally provide protection to young females." *Ibid.* (internal quotation marks omitted).[2]

b. The Immigration Judge (IJ) denied petitioner's application for asylum. Pet. App. 9a-24a. As relevant here, the IJ found that petitioner had established a well-founded fear that she would face persecution by gang members if she returned to El Salvador. *Id.* at 21a. The IJ identified the "more difficult issues in this case" as (1) whether the feared persecution was on account of membership in a "particular social group" and (2) whether petitioner belonged to a "particular social group" cognizable under the INA. *Ibid.*

On the question whether petitioner had shown the requisite nexus between the persecution and the putative social group (*i.e.*, that the persecution was "on account of" her membership in that group), the IJ explained that "factual inquiries in this area are notably difficult" and that "[d]eciphering the motives of potential persecutors, such as the gang members in this case, can be exceedingly challenging." Pet. App. 21a. On the record here, the IJ concluded, that factual inquiry showed that petitioner had been targeted by gangs principally because she was a source of money; petitioner's boyfriend had testified that he, his brother and friends,

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[2] Petitioner also sought withholding of removal to El Salvador, which required her to show that her "life or freedom would be threatened in that country because of [her] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). The Immigration Judge and the Board of Immigration Appeals rejected that claim, Pet. App. 7a-8a, 23a, and it is not at issue here. See note 4, *infra*.

and indeed "everyone" were asked for money by gang members. *Id.* at 22a. "Accordingly," the IJ concluded, "there has not been a sufficient showing as a factual matter on the record in this particular case that [petitioner] was targeted by the gangs based on" her membership in the group she identified in her asylum application. *Ibid.* The IJ therefore denied asylum without reaching the question whether petitioner's claimed social group was cognizable under the INA. *Id.* at 23a.

c. The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 6a-8a.

The Board found that there was not sufficient reason to reverse the IJ's denial of petitioner's application for asylum. Pet. App. 7a. First, the Board concluded that the IJ's factual findings were not clearly erroneous. *Ibid.* Second, the Board concluded that the IJ did not err in determining that petitioner had not met her burden of "establish[ing] a nexus" between her feared persecution and a protected ground, "because [petitioner] did not show that her membership in a particular social group was or will be at least one central reason for the harm she experienced or will experience upon return to El Salvador." *Ibid.* (citing 8 U.S.C. 1158(b)(1); 8 C.F.R. 1003.1(d)(3)(ii); and *In re J-B-N-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2007)). The Board therefore did not reach the question whether petitioner had successfully established that she was a member of a "particular social group" under the INA. *Id.* at 7a n.2.

3. Petitioner filed a petition for review. The court of appeals denied the petition in an unpublished, per curiam decision. Pet. App. 1a-5a.

The court of appeals first summarized the applicable law and standard of review as set forth in the INA and implementing regulations, in decisions of the Board, and

in its own precedents. Pet. App. 2a-4a. As relevant here, the court stated that an asylum applicant must establish a fear of persecution based on a protected ground; that "[t]he protected ground must be a central reason for being targeted for persecution"; and that "[a] central reason is one that is more than '"incidental, tangential, superficial, or subordinate to another reason for harm."'" *Id.* at 4a (quoting *Quinteros-Mendoza* v. *Holder*, 556 F.3d 159, 164 (4th Cir. 2009), and *J-B-N-*, 24 I. & N. Dec. at 214).

Turning to the facts of this case, the court of appeals held that petitioner had not shown from the record evidence that she experienced or had a well-founded fear of persecution "because of her membership in a particular social group." Pet. App. 4a. The court concluded that substantial evidence supported the IJ's findings "that the gangs in San Salvador were indiscriminate with whom they targeted" and that "[petitioner] would be targeted regardless of her membership in her particular social group." *Id.* at 4a-5a.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of another court of appeals. Contrary to petitioner's contention, the courts of appeals have not issued conflicting holdings on the validity of the Board's interpretation of the statutory term "one central reason." Even if there were such a circuit conflict, however, this case would not implicate it, because the decisions below did not hold that this case was controlled by the standard for evaluating "mixed-motive" asylum claims. Rather, they concluded that petitioner would have been "targeted *regardless of* her membership" in a putative particular

social group. Pet. App. 5a (emphasis added). Further review therefore is not warranted.

1. a. Petitioner's claim of a conflict centers on the Board's decision in *In re J-B-N-*, 24 I. & N. Dec. 208 (2007). In that case, the Board examined the extent to which the 2005 enactment of 8 U.S.C. 1158(b)(1)(B)(i) had changed the standard for evaluating asylum claims alleging persecution based on "mixed motives." 24 I. & N. Dec. at 212. The Board concluded that the standard it had previously applied "ha[d] not been radically altered" by the statutory amendment. *Id.* at 214. Based on the plain meaning of the term "central," the use of the indefinite modifier "one" (rather than the definite "the"), and the legislative history, *id.* at 212-213, the Board concluded that an alien cannot carry his or her burden of showing that the protected ground was a "central" reason if the protected ground played only a "minor role" in the alien's past or feared future mistreatment. *Id.* at 214. In other words, the Board explained, the alien must show that the protected ground was more than just "incidental, tangential, superficial, or subordinate to another reason for harm." *Ibid.*

The aliens in that case petitioned for review. The Third Circuit denied the petition, because the record supported a finding that the protected grounds were "no more than an incidental factor in their persecution." *Ndayshimiye* v. *Attorney Gen. of the U.S.*, 557 F.3d 124, 131 (2009). In reaching that conclusion, the Third Circuit approved most of the Board's articulation of the mixed-motive standard; it agreed that the Board's conclusion that a protected ground must be more than "incidental, tangential, or superficial" was consistent with both the amended statute and its legislative history. *Id.* at 130-131. The court concluded, however, that the

Board's interpretation was "in error *only* to the extent that it would require an asylum applicant to show that a protected ground * * * was not 'subordinate' to any unprotected [ground]." *Id.* at 129 (emphasis added). The court concluded that the language of the statute, which uses the phrase "*one* central reason" rather than "*the* central reason," permits an alien to establish eligibility for asylum if a protected ground is one of the central grounds for persecution, whether or not "one of those central reasons is more or less important than another." *Ibid.* The court disapproved only of the Board's use of the term "subordinate" in its standard: "once the term 'subordinate' is removed, the [Board's] interpretation constitutes a reasonable, valid construction of [the] 'one central reason' standard." *Id.* at 131. The court concluded that the Board's "misstep in interpreting [Section 1158(b)(1)(B)(i)]" did not affect the disposition of the petition for review, which it denied. *Id.* at 131, 133, 134.

Because the discussion of the term "subordinate" had no effect on the disposition of the case before the Third Circuit, that discussion was dictum. See *Ndayshimiye*, 557 F.3d at 133 (acknowledging that the Board's "opinion did not rest on a finding that [the protected ground] was subordinate to other reasons for persecution"). Since deciding *Ndayshimiye*, the Third Circuit has not relied on that dictum as precedent to grant any petition for review in any published or unpublished decision. Nor has the Board had occasion to consider in any precedential decision the significance of the Third Circuit's dictum, or to explain whether the Board meant the term "subordinate" (as used alongside "incidental, tangential, [and] superficial") to be read in a manner consistent with the Third Circuit's admonition that "the mixed-

motives analysis should not depend on a hierarchy of motivations in which one is dominant and the rest are subordinate," *id.* at 129.

b. No other court of appeals has disapproved the Board's definition even in part, and no other court of appeals (including the court below) has even considered the narrow question whether the Board's standard should not have included the term "subordinate." Accordingly, there is no circuit conflict warranting this Court's review.

Petitioner asserts (Pet. 7-8, 11, 13-14) that two other courts of appeals have joined the Third Circuit in partially disapproving of the Board's standard. That contention is incorrect. Neither of the decisions petitioner cites even discussed the issue, and both decisions denied petitions for review of the BIA's asylum-eligibility decisions.

In *Parussimova* v. *Mukasey*, 555 F.3d 734 (2009), the Ninth Circuit reiterated the standard set out in the Board's decision in *J-B-N-* and stated, "We are persuaded by such interpretation." *Id.* at 741. The court did not separately parse the term "subordinate" as used by the Board; although it noted that "persecution may be caused by more than one central reason, and an asylum applicant need not prove which reason was dominant," it did not suggest that the Board's standard was at all inconsistent with those observations. *Ibid.* And the court agreed with the Board that the alien in that case had not presented sufficient evidence to compel the conclusion that the protected ground was a central motivating factor in her persecution. See *id.* at 741-742.

Nothing in *Parussimova* supports petitioner's claim of a circuit conflict or casts doubt on the Board's standard.[3]

The other case petitioner identifies as agreeing with the Third Circuit is *Marroquin-Ochoma* v. *Holder*, 574 F.3d 574 (8th Cir. 2009). In that decision, the Eighth Circuit merely observed that a protected ground "need not be solely, or even predominantly, on account of the imputed political opinion," and cited *Parussimova* for that proposition. *Id.* at 577. It did not discuss *J-B-N-* or the Board's mixed-motive standard at all, although the court made clear that in the case before it the IJ had conducted a proper mixed-motive inquiry and had not applied any "impermissible 'single motive' requirement." *Ibid.* And as in both *Ndayshimiye* and *Parussimova*, the court denied the petition for review because the alien had not shown that the protected ground was a central reason for her persecution. See *id.* at 577-579, 580.

c. Moreover, the courts of appeals that petitioner identifies (Pet. 8-9, 14-16) as conflicting with the decisions discussed above—including the court below—have not in fact addressed the issue discussed in *Ndayshimiye*. Rather, in the decisions that petitioner cites, the courts simply stated that the protected ground must be "one central reason" for the claimed mistreatment and then recited and applied, as a whole, the Board's interpretation that the protected ground not be "incidental, tangential, superficial, or subordinate" to an unprotected ground. See *Shaikh* v. *Holder*, 588 F.3d 861, 864

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[3] As petitioner notes (Pet. 13), the Third Circuit opined in *Ndayshimiye* that the Ninth Circuit's decision in *Parussimova* "implicitly supports the excision of the word 'subordinate' " from the Board's standard. *Ndayshimiye*, 557 F.3d at 130. Even if that were so, it indisputably had no effect on the disposition of *Parussimova*.

(5th Cir. 2009); *Quinteros-Mendoza* v. *Holder*, 556 F.3d 159, 164 (4th Cir. 2009); *Singh* v. *Mukasey*, 543 F.3d 1, 5 (1st Cir. 2008). None of them separately analyzed the term "subordinate"—the only term that the Third Circuit found problematic—and none of them denied review on the ground that the claimed ground was not "central" simply because it was "subordinate" to another reason. See, *e.g.*, *Quinteros-Mendoza*, 556 F.3d at 165 (holding that the alien "ha[d] provided no evidence that his religious or political beliefs were more than incidental or tangential to any part of the persecution he suffered").

Thus, at most, a single court of appeals has voiced disagreement, in dictum, with a single word in the Board's formulation of the standard it applies in mixed-motive cases. No other court of appeals has addressed the Board's reference to "subordinate" reasons, much less held that the Board's approach to mixed-motive cases is erroneous in some broader sense that could benefit petitioner.

2. Even if there were a ripe conflict between the Third Circuit's decision in *Ndayshimiye* and the decisions of other courts of appeals, this case would not implicate that conflict. As the court of appeals correctly recognized, petitioner's evidence did not establish that her membership in a putative social group was *a* central factor in her persecution. The only suggestion in the decision below that mixed-motive analysis was relevant to this case at all is the citation of the court of appeals' prior decision in *Quinteros-Mendoza*, which in turn quoted the standard the Board set out in *J-B-N-*. See Pet. App. 4a. But neither the court below, nor the Board, nor the IJ suggested that petitioner's claim for asylum failed because her claimed protected ground was "subordinate" to an unprotected ground, in a way incon-

sistent with the Third Circuit's dictum in *Ndayshimiye*. To the contrary, the court of appeals concluded that "substantial evidence support[ed] the [IJ's] finding[s]," *i.e.*, that the gangs who targeted petitioner "were indiscriminate" and that petitioner "would be targeted *regardless* of her membership in her particular social group." *Id.* at 4a-5a (emphasis added); accord *id.* at 7a (Board's decision); *id.* at 21a-23a (IJ's finding that the record "does not demonstrate that *a* central reason for [petitioner's] feared persecution would be * * * her membership in the particular social group she claims") (emphasis added).

Thus, given the record evidence, the court of appeals correctly sustained the IJ's determination that, even if petitioner were a member of a particular social group, any such membership was at most an "incidental" or "tangential" reason for the gang members' actions. Every one of the decisions petitioner cites recognizes that such an "incidental" reason is not a "central reason" under Section 1158(b)(1)(B)(i). See, *e.g.*, *Ndayshimiye*, 557 F.3d at 130-131, 133. Further review therefore is not warranted.[4]

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[4] Although the question presented discusses only petitioner's eligibility for asylum, see Pet. i, the petition for a writ of certiorari contains a few tangential references (see Pet. 3, 9, 17) to withholding of removal, a distinct form of relief that is not properly at issue here. The statute discussed in the question presented, Section 1158(b)(1)(B)(i), applies directly only to eligibility for asylum; withholding of removal is governed by 8 U.S.C. 1231(b)(3). The Board has not yet explained in any precedential decision how the 2005 adoption of Section 1158(b)(1)(B)(i) may affect the standard for withholding of removal, and this case would present no occasion to take up that question: petitioner has never disputed the Board's conclusion that "because [petitioner] has not met the burden of proof for asylum, it follows that she cannot meet the more stringent burden of proof for withholding of removal," Pet.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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App. 7a-8a. See generally, *e.g.*, *Wood* v. *Allen*, 130 S. Ct. 841, 851 (2010) (matters not fairly included in the question presented are not properly before the Court, even if referred to in the text of the petition for a writ of certiorari).